

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Oct 08, 2021

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

JUSTIN M.,<sup>1</sup>

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>2</sup>

Defendant.

No. 2:20-cv-00338-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 20, 21

<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

<sup>2</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' cross-motions for summary judgment. ECF  
2 Nos. 20, 21. The parties consented to proceed before a magistrate judge. ECF No.  
3 8. The Court, having reviewed the administrative record and the parties' briefing,  
4 is fully informed. For the reasons discussed below, the Court denies Plaintiff's  
5 motion, ECF No. 20, and grants Defendant's motion, ECF No. 21.

### 6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
8 1383(c)(3).

### 9 STANDARD OF REVIEW

10 A district court's review of a final decision of the Commissioner of Social  
11 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
12 limited; the Commissioner's decision will be disturbed "only if it is not supported  
13 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
14 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
15 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
16 (quotation and citation omitted). Stated differently, substantial evidence equates to  
17 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and  
18 citation omitted). In determining whether the standard has been satisfied, a  
19 reviewing court must consider the entire record as a whole rather than searching  
20 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an  
7 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless  
8 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”  
9 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
10 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
11 *Sanders*, 556 U.S. 396, 409-10 (2009).

### 12 FIVE-STEP EVALUATION PROCESS

13 A claimant must satisfy two conditions to be considered “disabled” within  
14 the meaning of the Social Security Act. First, the claimant must be “unable to  
15 engage in any substantial gainful activity by reason of any medically determinable  
16 physical or mental impairment which can be expected to result in death or which  
17 has lasted or can be expected to last for a continuous period of not less than twelve  
18 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
19 impairment must be “of such severity that he is not only unable to do his previous  
20 work[,] but cannot, considering his age, education, and work experience, engage in

1 any other kind of substantial gainful work which exists in the national economy.”

2 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

3       The Commissioner has established a five-step sequential analysis to  
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
5 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
6 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
7 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
9 404.1520(b), 416.920(b).

10       If the claimant is not engaged in substantial gainful activity, the analysis  
11 proceeds to step two. At this step, the Commissioner considers the severity of the  
12 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
13 claimant suffers from “any impairment or combination of impairments which  
14 significantly limits [his or her] physical or mental ability to do basic work  
15 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
16 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
17 however, the Commissioner must find that the claimant is not disabled. *Id.*

18       At step three, the Commissioner compares the claimant’s impairment to  
19 severe impairments recognized by the Commissioner to be so severe as to preclude  
20 a person from engaging in substantial gainful activity. 20 C.F.R. §§

1 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
2 severe than one of the enumerated impairments, the Commissioner must find the  
3 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

4 If the severity of the claimant's impairment does not meet or exceed the  
5 severity of the enumerated impairments, the Commissioner must pause to assess  
6 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
7 defined generally as the claimant's ability to perform physical and mental work  
8 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
9 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
10 analysis.

11 At step four, the Commissioner considers whether, in view of the claimant's  
12 RFC, the claimant is capable of performing work that he or she has performed in  
13 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
14 If the claimant is capable of performing past relevant work, the Commissioner  
15 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).  
16 If the claimant is incapable of performing such work, the analysis proceeds to step  
17 five.

18 At step five, the Commissioner considers whether, in view of the claimant's  
19 RFC, the claimant is capable of performing other work in the national economy.  
20 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,

1 the Commissioner must also consider vocational factors such as the claimant's age,  
2 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
3 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
5 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
6 work, analysis concludes with a finding that the claimant is disabled and is  
7 therefore entitled to benefits. *Id.*

8       The claimant bears the burden of proof at steps one through four above.  
9 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
10 step five, the burden shifts to the Commissioner to establish that 1) the claimant is  
11 capable of performing other work; and 2) such work "exists in significant numbers  
12 in the national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*  
13 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

#### 14                                   **ALJ'S FINDINGS**

15       On October 24, 2017, Plaintiff applied both for Title II disability insurance  
16 benefits and Title XVI supplemental security income benefits alleging a disability  
17 onset date of August 1, 2017. Tr. 15, 63-64, 248-55. The applications were denied  
18 initially and on reconsideration. Tr. 127-33, 137-58. Plaintiff appeared before an  
19 administrative law judge (ALJ) on October 2, 2019. Tr. 32-62. On November 7,  
20 2019, the ALJ denied Plaintiff's claim. Tr. 12-31.

1 At step one of the sequential evaluation process, the ALJ found Plaintiff,  
2 who meets the insured status requirements through March 31, 2021, has not  
3 engaged in substantial gainful activity since August 1, 2017. Tr. 17. At step two,  
4 the ALJ found that Plaintiff has the following severe impairments: left shoulder  
5 degenerative joint disease; lumbar degenerative disc disease; left cubital tunnel  
6 syndrome; obesity; depression; anxiety; personality disorder; attention deficit  
7 hyperactivity disorder (ADHD); and post-traumatic stress disorder (PTSD). Tr. 17.

8 At step three, the ALJ found Plaintiff does not have an impairment or  
9 combination of impairments that meets or medically equals the severity of a listed  
10 impairment. Tr. 18-19. The ALJ then concluded that Plaintiff has the RFC to  
11 perform light work with the following limitations:

12 He can never climb ladders, ropes, or scaffolds; and can occasionally  
13 crawl, reach in all directions with the left non-dominant arm, and push  
14 and/or pull with the upper left extremity. [Plaintiff] can understand  
15 and perform simple routine repetitive tasks and have occasional  
superficial contact with the public and superficial workers which  
means he can perform no teamwork.<sup>3</sup>

16 <sup>3</sup> There are two discrepancies in the RFC that appear to be scrivener's errors. Tr.  
17 20. The hearing transcript shows that the ALJ provided two variations of one  
18 hypothetical to the VE. Tr. 57-58. The first version of the hypothetical is the same  
19 as written in the decision, except the ALJ said "understand, *remember*, and  
20 perform simple, routine, repetitive tasks" [emphasis added] and the ALJ said that

1  
2 Tr. 20.

3 At step four, the ALJ found Plaintiff is unable to perform any past relevant  
4 work. Tr. 24. At step five, the ALJ found that, considering Plaintiff's age,  
5 education, work experience, RFC, and testimony from the vocational expert, there

6  
7 the individual would have occasional superficial contact with the public and  
8 superficial contact with coworkers, not "superficial workers," as written in the  
9 decision. *Id.* The second hypothetical was the same, except with the addition of  
10 absences from the workstation, which the VE said would result in inability to  
11 sustain competitive work. Tr. 58. As she issued a denial, it is clear that the ALJ  
12 intended to use her first hypothetical. The scrivener's errors do not change the  
13 outcome of the decision, the meaning remains clear, and these are found to be  
14 harmless. *See Bamforth v. Colvin*, C13-5618BHS, 2014 WL 2711827, at \*2-3  
15 (W.D. Wash. June 16, 2014); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.  
16 2008) (an error is harmless when "it is clear from the record that the . . . error was  
17 inconsequential to the ultimate nondisability determination"); *Molina*, 674 F.3d at  
18 121 ("Even when an agency explains its decision with less than ideal clarity we  
19 must uphold it if the agency's path may reasonable be discerned." (internal  
20 quotation marks omitted)).



1 were jobs that existed in significant numbers in the national economy that Plaintiff  
2 could perform, such as mail clerk, office helper, and photocopier operator. Tr. 25.  
3 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the  
4 Social Security Act, from the alleged onset date of August 1, 2017, through the  
5 date of the decision. Tr. 26.

6 On July 22, 2020, the Appeals Council denied review of the ALJ's decision,  
7 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes  
8 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

### 9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying  
11 him disability insurance benefits under Title II and supplemental security income  
12 benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
13 issues for review:

- 14 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 15 2. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 16 3. Whether the ALJ conducted a proper step-five analysis.

17 ECF No. 20 at 2, 15-19.

## DISCUSSION

### A. Medical Opinion Evidence

Plaintiff contends the ALJ erred in rejecting the opinions of examining psychologists Thomas Genthe, Ph.D., and Patrick Metoyer, Ph.D. ECF No. 20 at 16.<sup>4</sup> As an initial matter, for claims filed on or after March 27, 2017, new regulations apply that change the framework for how an ALJ must evaluate medical opinion evidence. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20

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<sup>4</sup> In his opening brief, Plaintiff lists the first issue as whether the ALJ properly evaluated the medical opinion evidence from the treating, examining, and reviewing medical sources. *See* ECF No. 20 at 2. In the argument section Plaintiff lists only Dr. Genthe and Dr. Metoyer. *See* ECF No. 20 at 2, 14-16. Plaintiff failed to specifically and distinctly argue his claim of error concerning any other medical opinion evidence and has therefore waived his challenge to the other medical opinions, as discussed *infra*. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1115, 1161 n.2 (determining Court may decline to address on the merits issues not argued with specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may not consider on appeal issues not “specifically and distinctly argued” in the party’s opening brief).

1 C.F.R. §§ 404.1520c, 416.920c. The new regulations provide that the ALJ will no  
2 longer “give any specific evidentiary weight...to any medical  
3 opinion(s)...” *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-  
4 68; *see* 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, an ALJ must consider  
5 and evaluate the persuasiveness of all medical opinions or prior administrative  
6 medical findings from medical sources. 20 C.F.R. §§ 404.1520c(a) and (b),  
7 416.920c(a) and (b). The factors for evaluating the persuasiveness of medical  
8 opinions and prior administrative medical findings include supportability,  
9 consistency, relationship with the claimant (including length of the treatment,  
10 frequency of examinations, purpose of the treatment, extent of the treatment, and  
11 the existence of an examination), specialization, and “other factors that tend to  
12 support or contradict a medical opinion or prior administrative medical finding”  
13 (including, but not limited to, “evidence showing a medical source has familiarity  
14 with the other evidence in the claim or an understanding of our disability  
15 program’s policies and evidentiary requirements”). 20 C.F.R. §§ 404.1520c(c)(1)-  
16 (5), 416.920c(c)(1)-(5).

17 Supportability and consistency are the most important factors, and therefore  
18 the ALJ is required to explain how both factors were considered. 20 C.F.R. §§  
19 404.1520c(b)(2), 416.920c(b)(2). Supportability and consistency are explained in  
20 the regulations:

1 (1) *Supportability*. The more relevant the objective medical evidence  
2 and supporting explanations presented by a medical source are to  
3 support his or her medical opinion(s) or prior administrative medical  
4 finding(s), the more persuasive the medical opinions or prior  
5 administrative medical finding(s) will be.

6 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
7 administrative medical finding(s) is with the evidence from other  
8 medical sources and nonmedical sources in the claim, the more  
9 persuasive the medical opinion(s) or prior administrative medical  
10 finding(s) will be.

11 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). The ALJ may, but is not  
12 required to, explain how the other factors were considered. 20 C.F.R. §§  
13 404.1520c(b)(2), 416.920c(b)(2). However, when two or more medical opinions  
14 or prior administrative findings “about the same issue are both equally well-  
15 supported ... and consistent with the record ... but are not exactly the same,” the  
16 ALJ is required to explain how “the other most persuasive factors in paragraphs  
17 (c)(3) through (c)(5)” were considered. 20 C.F.R. §§ 404.1520c(b)(3),  
18 416.920c(b)(3).

19 The parties disagree over whether Ninth Circuit case law continues to be  
20 controlling in light of the amended regulations, specifically whether the “clear and  
convincing” and “specific and legitimate” standards still apply. ECF No. 16 at 13-  
18; ECF No. 17 at 7-10. “It remains to be seen whether the new regulations will  
meaningfully change how the Ninth Circuit determines the adequacy of [an] ALJ’s  
reasoning and whether the Ninth Circuit will continue to require that an ALJ

1 provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis  
2 of medical opinions, or some variation of those standards.” *Gary T. v. Saul*, No.  
3 EDCV 19-1066-KS, 2020 WL 3510871, at \*3 (C.D. Cal. June 29,  
4 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at \*3  
5 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer  
6 to the new regulations, even where they conflict with prior judicial precedent,  
7 unless the prior judicial construction ‘follows from the unambiguous terms of the  
8 statute and thus leaves no room for agency discretion.’” *Gary T.*, 2020 WL  
9 3510871, at \*3 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet*  
10 *Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d  
11 Cir. 1993) (“New regulations at variance with prior judicial precedents are upheld  
12 unless ‘they exceeded the Secretary’s authority [or] are arbitrary and  
13 capricious.’”).

14       There is not a consensus among the district courts as to whether the “clear  
15 and convincing” and “specific and legitimate” standards continue to apply. *See*,  
16 *e.g.*, *Kathleen G. v. Comm’r of Soc. Sec.*, 2020 WL 6581012, at \*3 (W.D. Wash.  
17 Nov. 10, 2020) (applying the specific and legitimate standard under the new  
18 regulations); *Timothy Mitchell B., v. Kijakazi*, 2021 WL 3568209, at \*5 (C.D. Cal.  
19 Aug. 11, 2021) (stating the court defers to the new regulations); *Agans v. Saul*,  
20 2021 WL 1388610, at \*7 (E.D. Cal. Apr. 13, 2021) (concluding that the new

1 regulations displace the treating physician rule and the new regulations control);  
2 *Madison L. v. Kijakazi*, No. 20-CV-06417-TSH, 2021 WL 3885949, at \*4-6 (N.D.  
3 Cal. Aug. 31, 2021) (applying only the new regulations and not the specific and  
4 legitimate nor clear and convincing standard). For the sake of consistency in this  
5 District, the Court adopts the rationale and holding articulated on the issue in  
6 *Emilie K. v. Saul*, No. 2:20-cv-00079-SMJ, 2021 WL 864869, \*3-4 (E.D. Wash.  
7 Mar. 8, 2021), *appeal docketed*, No. 21-35360 (9th Cir. May 10, 2021). In *Emilie*  
8 *K.*, this Court held that the ALJ did not err in applying the new regulations over  
9 Ninth Circuit precedent, because the result did not contravene the Administrative  
10 Procedure Act’s requirement that decisions include a statement of “findings and  
11 conclusions, and the reasons or basis therefor, on all the material issues of fact,  
12 law, or discretion presented on the record.” *Id.* at \*4 (citing 5 U.S.C. § 557(c)(A)).  
13 This rationale has been adopted in other cases with this Court. *See, e.g., Jeremiah*  
14 *F. v. Kijakazi*, No. 2:20-CV-00367-SAB, 2021 WL 4071863, at \*5 (E.D. Wash.  
15 Sept. 7, 2021). Nevertheless, it is not clear that the Court’s analysis in this matter  
16 would differ in any significant respect under the specific and legitimate standard  
17 set forth in *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

18 *I. Dr. Genthe*

19 a. September 2017 Evaluation and Review by Dr. Sanchez

1 On September 1, 2017 Dr. Genthe conducted a psychological examination  
2 and rendered an opinion on Plaintiff's functioning for DSHS benefits. Tr. 375-85.  
3 Dr. Genthe diagnosed Plaintiff with a panic disorder, agoraphobia, generalized  
4 anxiety disorder, ADHD (combined presentation), intermittent explosive disorder,  
5 other specified anxiety disorder, other specified depressive disorder (mild), other  
6 specified personality disorder (with borderline features) and cannabis use disorder,  
7 in sustained remission. Tr. 378. Dr. Genthe opined: Plaintiff has moderate  
8 limitation in his ability to understand, remember and persist in tasks by following  
9 very short and simple instructions, in his ability to perform activities within a  
10 schedule, maintain regular attendance, and be punctual within customary  
11 tolerances without special supervision, to learn new tasks and perform routine  
12 tasks without special supervision, make simple work related decisions, be aware of  
13 normal hazards and take appropriate precautions, ask simple questions or request  
14 assistance, and to set realistic goals and plan independently; marked limitation in  
15 his ability to understand, remember and persist in tasks by following detailed  
16 instructions, adapt to changes in a routine work setting, and communicate and  
17 perform effectively in a work setting; and severe limitation in his ability to  
18 maintain appropriate behavior in a work setting. Tr. 378-79. Dr. Genthe further  
19 opined Plaintiff's impairments overall have a marked severity rating, were  
20 expected to last 9-12 months with treatment, and that vocational training or

1 services would minimize or eliminate barriers to employment. Tr. 379. He also  
2 explained that personality inventory testing “raised the question if the information  
3 [Plaintiff] provided verbally can be taken at face value.” *Id.*

4 On September 19, 2017, Dr. Phyllis Sanchez, Ph.D., reviewed Dr. Genthe’s  
5 September 1, 2017 evaluation, and she also rendered an opinion on Plaintiff’s  
6 mental health severity and functioning for eligibility for DSHS benefits. Tr. 372-  
7 74. She notes the same mental functional limitations as Dr. Genthe, using the same  
8 DSHS form, except she checked the box indicating Plaintiff has marked limitations  
9 in his ability to complete a normal workday and workweek without interruptions  
10 from psychologically based symptoms, adding this mental limitation in a row on  
11 the form that Dr. Genthe left blank. Tr. 373, 379. Dr. Sanchez opined Plaintiff’s  
12 overall severity rating is a four and rated his functional symptoms four as well.<sup>5</sup>  
13 The ALJ did not find Dr. Genthe’s or Dr. Sanchez’s September 2017 opinions  
14 persuasive. Tr. 23.

15 First, the ALJ found Dr. Genthe’s opinion was not consistent with his own  
16 mental status exam. Tr. 23. Consistency is one of the most important factors an

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17  
18 <sup>5</sup> While the questionnaire does not list the definitions of the numerical ratings,  
19 WAC 388-449-0035 provides the definition of the severity ratings, and defines a  
20 rating of four as marked.



ALJ must consider when determining how persuasive a medical opinion is. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more consistent an opinion is with the evidence from other sources, the more persuasive the opinion is. 20 C.F.R. §§ 404.1520c(c)(2), 416.920c(c)(2). While Dr. Genthe opined Plaintiff had overall marked limitations, this is not consistent with his own objective findings on mental status exam where he observed Plaintiff to be well groomed with good hygiene, normal speech, and a cooperative and friendly attitude. Tr. 380. While Dr. Genthe noted Plaintiff described his own mood as anxious and Dr. Genthe did observe Plaintiff's nervous affect, he also observed Plaintiff's thought process was normal, he was oriented, and his perception and memory were within normal limits. *Id.* While his fund of knowledge was slightly limited, his concentration appeared intact, and Dr. Genthe noted Plaintiff could spell the word world forward and backward without mistake and could make change for a dollar. *Id.* While Dr. Genthe observed Plaintiff had poor understanding of need for treatment and poor level of social maturity, Dr. Genthe also indicated Plaintiff had a fair understanding of the factors contributing to his illness. Tr. 382. Dr. Genthe provides no explanation for how his findings translate into a marked severity rating. He also left portions of the form blank, including section "D. Clinical Findings" where he was asked to list all mental health symptoms that affect the individual's ability to work. Tr. 378. The ALJ reasonably found Dr. Genthe's

1 opinion was inconsistent with the generally unremarkable findings in his  
2 evaluation.

3 Second, the ALJ found that the opinions of Dr. Genthe and Dr. Sanchez  
4 were not “supported, by either Dr. Genthe’s mental status exam or the longitudinal  
5 record,” and that both opinions were inconsistent with numerous unremarkable  
6 mental status exams throughout the record, “indicating that Dr. Genthe may have  
7 relied more on [Plaintiff’s] presentation and statements (subjective complaints)  
8 than objective findings.” Tr. 23. Supportability is one of the most important  
9 factors an ALJ must consider when determining how persuasive a medical opinion  
10 is. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). The more relevant objective  
11 evidence and supporting explanations that support a medical opinion, the more  
12 persuasive the medical opinion is. 20 C.F.R. §§ 404.1520c(c)(1), 416.920c(c)(1).  
13 As discussed *supra* Dr. Genthe’s mental status exam was unremarkable. Tr. 380-  
14 82. Dr. Sanchez did not meet with Plaintiff to perform an evaluation or mental  
15 status exam, and the only record she reviewed was Dr. Genthe’s evaluation from  
16 earlier that month. Tr. 372-74. Review of the record as a whole, however, reveals  
17 generally normal mental status exams.

18 As noted by the ALJ, Plaintiff had normal mental status exams at multiple  
19 office visits. Tr. 22-23, 398, 418, 425. Plaintiff argues that the ALJ relies on notes  
20 from physical exams rather than mental exams. ECF No. 20 at 12, 16. However,

1 two of the three visits cited here by the ALJ were mental health appointments  
2 where a mental status exam was performed. Tr. 418, 425. For example, at a  
3 January 18, 2018 mental health appointment, upon mental status exam Plaintiff  
4 appeared groomed with good hygiene; his thought process was future oriented and  
5 organized; his mood was normal with congruent affect; his speech was normal, and  
6 his provider observed he was alert and oriented. Tr. 418. His provider also noted  
7 Plaintiff's report of only one panic attack in the last two weeks that was so brief he  
8 did not need to use any medication to control the symptoms. *Id.* At the February  
9 1, 2018 mental health appointment cited by the ALJ, upon mental status exam  
10 Plaintiff's provider again observed he was groomed and had good hygiene; his  
11 thought process was future oriented and organized; his mood was again normal,  
12 and his affect was congruent; his speech was normal and he remained alert and  
13 oriented. Tr. 425. At a medication management appointment on the same day, the  
14 nurse practitioner noted Plaintiff's report he was doing "good" since restarting  
15 medication, and that his anxiety had decreased. Tr. 427. Upon mental status exam  
16 she observed Plaintiff had good hygiene and maintained eye contact well; he was  
17 calm and pleasant; his speech was animated but unpressured and his thought  
18 process was appropriate; he denied perceptual thought content disturbances; his  
19 affect was full, and his insight and judgement were fair to good. Tr. 428. Mental  
20 status exams performed at mental health appointments throughout 2018 and 2019

1 are similarly unremarkable. *See, e.g.*, 410, 413, 422, 428, 435, 460, 462, 509-10,  
2 514.

3 While Plaintiff was observed to be anxious at a mental health intake  
4 evaluation on October 4, 2017, and the clinician noted that he would “shut down”  
5 when she asked personal questions, she also observed him to be engaged and  
6 cooperative and noted his concentration was fair. Tr. 443. At that time, Plaintiff  
7 also reported he was also experiencing a period of homelessness and was staying  
8 with an ex-girlfriend. Tr. 439. He reported he was getting panic attacks due to  
9 worry and stressors, but also “because I am not comfortable at her house.” Tr. 439.  
10 By an appointment on October 16, 2017, however, although Plaintiff appeared  
11 anxious, he was observed to have good grooming and normal speech, and he was  
12 oriented, articulate, organized, and future focused. Tr. 455. The ALJ’s finding  
13 that Dr. Genthe’s and Dr. Sanchez’s opinions were inconsistent with Dr. Genthe’s  
14 own mental status exam and unsupported by the cited objective evidence from  
15 numerous mental status exams throughout the record is supported by substantial  
16 evidence. *See Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); *Bray v.*  
17 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009).

18 b. July 2019 evaluation

19 Dr. Genthe met with Plaintiff for a second evaluation on July 29, 2019. Tr.  
20 557-566. Dr. Genthe diagnosed Plaintiff with other specified depressive disorder,

1 mild; panic disorder; agoraphobia; generalized anxiety disorder; and ADHD,  
2 combined presentation. Tr. 560. Dr. Genthe opined Plaintiff had no or mild  
3 limitation in his ability to understand, remember, and persist in tasks by following  
4 very short and simple instructions and to make simple work-related decisions;  
5 moderate limitation in his ability to perform activities within a schedule, maintain  
6 regular attendance, and be punctual within customary tolerances without special  
7 supervision, to learn new tasks and perform routine tasks without special  
8 supervision, to ask simple questions or request assistance, and to set realistic goals  
9 and plan independently; and marked limitation in his ability to understand,  
10 remember and persist in tasks by following detailed instructions, adapt to changes  
11 in a routine work setting, communicate and perform effectively in a work setting,  
12 maintain appropriate behavior in a work setting, and to complete a normal workday  
13 and workweek without interruptions from psychologically based symptoms. Tr.  
14 560-61. Dr. Genthe opined Plaintiff's impairments overall had a marked severity  
15 rating, were expected to last 12 months with treatment, and that vocational training  
16 or services would minimize or eliminate barriers to employment. Tr. 561. The  
17 ALJ found Dr. Genthe's 2019 opinion unpersuasive, except to agree with the  
18 portions of the opinion that found Plaintiff had no to mild limitations. Tr. 23.

19 The ALJ found that Dr. Genthe's opinion "again seems to rely more on  
20 [Plaintiff's] description of alleged symptoms than his presentation" and was not

1 supported by the objective record. *Id.* As discussed *supra*, Dr. Genthe’s opinion is  
2 not supported by the medical evidence as a whole, including mental status exams  
3 by Plaintiff’s treating mental health providers throughout the period at issue.  
4 Similarly, Dr. Genthe’s 2019 opinion is unsupported by his own mental status  
5 exam and other findings on that day. Tr. 23, 562-63. Here, Dr. Genthe observed  
6 Plaintiff appeared well groomed and had good hygiene, his speech was normal,  
7 and he presented as generally open, cooperative, and friendly. Tr. 562. Plaintiff  
8 reported his own mood as anxious, and Dr. Genthe noted Plaintiff appeared  
9 nervous. *Id.* Although his thoughts reflected some depression and anxiety,  
10 Plaintiff’s thought process and content were normal, he was oriented, and his  
11 perception and memory appeared within normal limits; his concentration and  
12 abstract thought were also within normal limits, and his insight and judgement  
13 were improved from the last evaluation. Tr. 562-63. Dr. Genthe observed  
14 Plaintiff’s level of social maturity (noted as willingness to respond to society  
15 appropriately) was still poor. *Id.* Under clinical findings, Dr. Genthe noted  
16 Plaintiff’s report that “depression is present but does not cause him significant  
17 emotional distress or impairment in functioning,” and that while he experienced  
18 symptoms of panic, Plaintiff reported this was limited to two to three times a week  
19 for five to 30 minutes. Tr. 559. While Dr. Genthe opined that Plaintiff’s  
20 “symptoms have not improved to the point of him being able to resume normal

1 work activities” and “he is unlikely to function adequately, and/or consistently in a  
2 work setting until his psychological symptoms have been managed more  
3 effectively,” he again noted that testing suggested some caution in interpreting  
4 Plaintiff’s evaluation as there was a possibility of distortion and potential  
5 overrepresenting of the extent and degree of clinical symptoms and related  
6 impairment in certain areas. Tr. 564-65.

7 The ALJ’s finding that Dr. Genthe’s 2019 opinion was not supported by the  
8 record, including his own mental status exam and other findings is supported by  
9 substantial evidence. *See Holohan*, 246 F.3d at 1202; *Bray*, 554 F.3d at 1228.

10 c. Dr. Gilbert

11 The ALJ found Dr. Genthe and Dr. Sanchez’s opinions less persuasive than  
12 the opinion of Dr. Gilbert. Tr. 24. On August 6, 2018, Dr. Gilbert opined Plaintiff  
13 retains the capacity to carry out simple one to three step instructions, maintain  
14 concentration, persistence, and pace for up to two hours continuously, maintain  
15 adequate attendance, and complete a normal workday/workweek within normal  
16 tolerances of a competitive workplace; he retains the capacity to interact with  
17 others on an occasional, superficial basis; and retains the ability to accept  
18 instructions from a supervisor; and that he will have occasional difficulties with  
19 adapting to change, but will be able to adapt to normal, routine changes in a  
20 competitive workplace within normal tolerances. Tr. 105-07, 122-24.

1 The ALJ found Dr. Gilbert's opinion more persuasive than Dr. Genthe's and  
2 Dr. Sanchez's opinions because it was consistent with the overall medical record  
3 and supported by objective findings. Tr. 24. Consistency and supportability are  
4 the two most important factors when considering the persuasiveness of medical  
5 opinions. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). As discussed *supra*, the  
6 ALJ found Dr. Genthe's and Dr. Sanchez's opinions inconsistent with the objective  
7 medical evidence including Dr. Genthe's own mental status exams on two  
8 occasions, and the record as a whole including findings from multiple mental  
9 health treatment records. This reason was supported by substantial evidence. *See*  
10 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996).

11 *2. Dr. Metoyer*

12 On June 18, 2018, Dr. Metoyer conducted a psychological examination and  
13 rendered an opinion on Plaintiff's functioning. Tr. 465-69. Dr. Metoyer diagnosed  
14 Plaintiff with PTSD; a panic disorder; major depressive disorder, (recurrent,  
15 moderate); ADHD; and an unspecified personality disorder (rule out intermittent  
16 explosive disorder) by history. Tr. 468-69. He opined that Plaintiff appears to  
17 have the ability to reason and understand, and has some adaption skills; his  
18 memory is intact; his ability to sustain concentration and persistence are mildly  
19 impaired; his ability to interact with co-workers and the public is likely moderately  
20 impaired; his ability to maintain regular attendance in the workplace is moderately



1 impaired due to PTSD, anxiety, and mood symptoms and tendency to isolate  
2 himself from others; his ability to complete a normal work day or work week  
3 without interruption from PTSD and anxiety and mood symptoms is likely  
4 moderately impaired; and his ability to deal with the usual stress encountered in the  
5 work place is moderately impaired if it involves persistent activity, complex tasks,  
6 task pressure, and interaction with other individuals. Tr. 469. The ALJ found this  
7 opinion persuasive. Tr. 23.

8 Plaintiff argues the ALJ improperly rejected the opinion of Dr. Metoyer,  
9 ECF No. 20 at 6-7, 16, however, the Court finds the ALJ did not reject this  
10 opinion. Tr. 23. The ALJ explained Dr. Metoyer's opinion was based on a  
11 thorough in person interview and mental status exam, which supported his  
12 functional assessment, and that his opinion was generally consistent with the  
13 overall record. *Id.* Consistency is one of the most important factors an ALJ must  
14 consider when determining how persuasive a medical opinion is. 20 C.F.R. §§  
15 404.1520c(b)(2), 416.920c(b)(2). The more consistent an opinion is with the  
16 evidence from other sources, the more persuasive the opinion is. 20 C.F.R. §§  
17 404.1520c(c)(2), 416.920c(c)(2). Upon mental status exam, Dr. Metoyer found  
18 Plaintiff anxious, irritable, and somewhat uncooperative, noting that he provided  
19 short answers and "refused to answer some questions." Tr. 467. Dr. Metoyer  
20 reported that Plaintiff described his own mood as irritable, frustrated, anxious,

1 depressed but “sometimes ok.” *Id.* Dr. Metoyer observed Plaintiff’s was oriented,  
2 however, and his thought, speech, memory, concentration, insight and judgement  
3 were all within normal limits. Tr. 467-68. The ALJ found Dr. Metoyer’s opinion  
4 consistent with his own exam and the overall record. Even if this evidence could  
5 be interpreted more favorably to Plaintiff, if it is susceptible to more than one  
6 rational interpretation, the ALJ’s ultimate conclusion must be upheld. *Burch v.*  
7 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The ALJ found this opinion  
8 persuasive, and the ALJ’s findings are supported by substantial evidence.

9 Plaintiff failed to specifically and distinctly argue his claim of error  
10 concerning the opinions of Dr. Fitterer and Dr. Massoud, therefore Plaintiff has  
11 waived his arguments concerning these medical opinions. The court ordinarily  
12 will not consider matters on appeal that are not specifically and distinctly argued in  
13 an appellant’s opening brief. *See Carmickle v. Comm’r of Soc. Sec. Admin.*, 533  
14 F.3d 1155, 1161 n.2 (9th Cir. 2008). The Ninth Circuit “has repeatedly  
15 admonished that [it] cannot ‘manufacture arguments for an appellant.’”  
16 *Independent Towers v. Washington*, 350 F.3d 925, 929 (9th Cir.2003) (quoting  
17 *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir.1994)). Rather, the  
18 Court will “review only issues which are argued specifically and distinctly.”  
19 *Independent Towers*, 350 F.3d at 929. When a claim of error is not argued and  
20 explained, the argument is waived. *See id.* at 929-30 (holding that party’s

1 argument was waived because the party made only a “bold assertion” of error, with  
2 “little if any analysis to assist the court in evaluating its legal challenge”); *see also*  
3 *Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 873 n.34 (9th Cir. 2001) (finding an  
4 allegation of error was “too undeveloped to be capable of assessment”).

5 Plaintiff mentions the opinions of Dr. Fitterer and Dr. Massoud in his brief,  
6 specifically that the ALJ failed to include limitations from these providers in the  
7 ALJs hypothetical to the vocational expert. ECF No. 20 at 18. Plaintiff alleges  
8 that “Dr. Massoud opined Plaintiff needed a desk job” and “Dr. Fitterer said Mr.  
9 Medeiros could not use the left arm for reaching in any direction and overhead.”  
10 *Id.* However, Plaintiff fails to provide any reasoning or argument or address the  
11 ALJ’s consideration of these opinions. *See* ECF No. 20 at 10, 18-19. An opening  
12 brief must contain the Plaintiff’s contentions, the reasons for the contentions, and  
13 citations to the authority and portions of the record on which Plaintiff relies. *See*  
14 *Independent Towers*, 350 F.3d at 930. Here, Plaintiff mentions limitations  
15 provided by Dr. Fetterer and Dr. Massoud but does not explain the ALJ’s  
16 discussion of these medical opinions, how or why the ALJ erred, or provide  
17 evidence the ALJ mischaracterized or misconstrued the opinions. By failing to  
18 provide any reasons for his contentions and not citing to any records that support  
19 his contentions, Plaintiff waived the arguments.

1 Given this waiver, the Court declines to address Plaintiff's challenge to the  
2 ALJ's medical opinion analysis for Dr. Fitterer and Dr. Massoud.

3 **B. Plaintiff's Symptom Claims**

4 Plaintiff contends the ALJ erred by failing to rely on reasons that were clear  
5 and convincing in discrediting his symptom claims. ECF No. 20 at 16-17. An  
6 ALJ engages in a two-step analysis to determine whether to discount a claimant's  
7 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.  
8 "First, the ALJ must determine whether there is objective medical evidence of an  
9 underlying impairment which could reasonably be expected to produce the pain or  
10 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).  
11 "The claimant is not required to show that [the claimant's] impairment could  
12 reasonably be expected to cause the severity of the symptom [the claimant] has  
13 alleged; [the claimant] need only show that it could reasonably have caused some  
14 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

15 Second, "[i]f the claimant meets the first test and there is no evidence of  
16 malingering, the ALJ can only reject the claimant's testimony about the severity of  
17 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
18 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
19 omitted). General findings are insufficient; rather, the ALJ must identify what  
20 symptom claims are being discounted and what evidence undermines these claims.

1 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas*, 278 F.3d at 958 (requiring the ALJ to  
2 sufficiently explain why it discounted claimant’s symptom claims)). “The clear  
3 and convincing [evidence] standard is the most demanding required in Social  
4 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting  
5 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

6 Factors to be considered in evaluating the intensity, persistence, and limiting  
7 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
8 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
9 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
10 side effects of any medication an individual takes or has taken to alleviate pain or  
11 other symptoms; 5) treatment, other than medication, an individual receives or has  
12 received for relief of pain or other symptoms; 6) any measures other than treatment  
13 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
14 factors concerning an individual’s functional limitations and restrictions due to  
15 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §  
16 404.1529(c). The ALJ is instructed to “consider all of the evidence in an  
17 individual’s record,” “to determine how symptoms limit ability to perform work-  
18 related activities.” SSR 16-3p, 2016 WL 1119029, at \*2.

19 The ALJ found that Plaintiff’s medically determinable impairments could  
20 reasonably be expected to cause the alleged symptoms, but that Plaintiff’s

1 statements concerning the intensity, persistence, and limiting effects of his  
2 symptoms were not entirely consistent with the evidence. Tr. 20-21.

3 *1. Inconsistent Objective Medical Evidence*

4 The ALJ found Plaintiff's symptom claims were inconsistent with the  
5 objective medical evidence. Tr. 21-22. An ALJ may not discredit a claimant's  
6 symptom testimony and deny benefits solely because the degree of the symptoms  
7 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261  
8 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.  
9 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*, 400 F.3d at 680.  
10 However, the objective medical evidence is a relevant factor, along with the  
11 medical source's information about the claimant's pain or other symptoms, in  
12 determining the severity of a claimant's symptoms and their disabling effects.  
13 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

14 While Plaintiff described ongoing left shoulder, arm, and back issues, the  
15 ALJ noted records show generally mild findings upon physical exam. Tr. 21. The  
16 ALJ noted that in January 2018 Plaintiff had no tenderness to palpation in his left  
17 shoulder and full active range of motion. Tr. 21, 404. An ultrasound of his left  
18 shoulder in February 2018 was normal and an x-ray of his left shoulder in May  
19 2018 was negative. Tr. 408, 534-35. The ALJ acknowledged Plaintiff had mild  
20 tenderness to palpation upon exam in in February 2019, and that his shoulder joint

1 appeared to “pop out of alignment” when rotated; records show an MRI was  
2 recommended. Tr. 21, 576, 578. Plaintiff testified he was unable to get a  
3 traditional MRI due to feeling claustrophobic and is trying physical therapy first  
4 and waiting until he can get an open MRI. Tr. 48, 53. In October 2019 Plaintiff  
5 told his provider he thought his arm and left shoulder joint pain was related to how  
6 he sat when playing computer games. Tr. 542, 547. While Plaintiff has been  
7 diagnosed with cubital tunnel syndrome, the ALJ noted that in January 2019  
8 Plaintiff’s sensation to light touch in his hands remained intact upon exam. Tr. 21,  
9 570. The only treatment recommended at that time was an elbow brace and to stop  
10 leaning on the table when he played online games, and Plaintiff reported  
11 improvement by the next month. Tr. 21, 570, 574. Although he reports neck and  
12 back pain, and the ALJ noted he had some tenderness to palpitation over the  
13 paraspinal muscles bilaterally upon physical exam in January 2018, the ALJ also  
14 noted he had normal muscle tone and strength and straight leg raises were negative  
15 bilaterally at that exam. Tr. 21, 389-90. The ALJ noted x-rays of Plaintiff’s  
16 lumbar spine in 2018 showed moderate degenerative changes but were otherwise  
17 unremarkable and x-rays of his cervical spine were normal. Tr. 21, 393-94.

18 While Plaintiff alleges significant limitations from mental health issues  
19 including panic attacks, the ALJ noted generally unremarkable mental status  
20

1 exams, as described in-depth *supra*, and the ALJ noted Plaintiff's symptoms were  
2 reduced with medication. Tr. 22, 418, 422, 425, 428.

3 Plaintiff argues the ALJ "cherry picked irrelevant inconsistencies" that were  
4 inconsistent with the record as a whole. ECF No. 20 at 17. Defendant argues  
5 Plaintiff asserts without citation that the ALJ cherry picked the record, and that  
6 Plaintiff's bare assertion of error is not enough to overturn the ALJ's reasonable  
7 finding. ECF No. 21 at 17. This is correct, as Plaintiff fails to provide any  
8 examples to support his argument, and the ALJ pointed to multiple inconsistencies.  
9 Further, the ALJ's finding that Plaintiff's report of symptoms was not entirely  
10 consistent with the objective medical evidence was reasonable. This was a clear  
11 and convincing reason, when combined with the other reasons offered, to discount  
12 Plaintiff's symptom reports.

### 13 2. *Improvement with Treatment*

14 The ALJ found Plaintiff's symptom allegations were inconsistent with  
15 Plaintiff's improvement with treatment. Tr. 22. The effectiveness of treatment is a  
16 relevant factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§  
17 404.1529(c)(3), 416.913(c)(3); *see Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d  
18 1001, 1006 (9th Cir. 2006); *Tommasetti*, 533 F.3d at 1040 (a favorable response to  
19 treatment can undermine a claimant's complaints of debilitating pain or other  
20 severe limitations). The ALJ notes Plaintiff reported improvement in mood



1 symptoms when he was taking medication regularly. Tr. 22, 413, 425, 428. In  
2 January 2018 he reported he was able to recover from a panic attack using coping  
3 skills, was not having panic attacks because he was having so much fun making a  
4 YouTube channel, and that he was stable and medications were working well. Tr.  
5 410, 422. In February 2018 he reported his anxiety and irritability had improved  
6 since restarting Trintellix and he had not needed diazepam for breakthrough  
7 anxiety for a few weeks; he reported he was also trying to socialize and make  
8 positive connections. Tr. 427-28.

9 On this record, the ALJ reasonably found Plaintiff's symptoms when treated  
10 were not as severe as Plaintiff claimed. This was a clear and convincing reason to  
11 discount Plaintiff's symptom reports.

### 12 *3. Activities of Daily Living*

13 The ALJ found Plaintiff's activities of daily living were inconsistent with his  
14 symptom claims. Tr. 19-22. The ALJ may consider a claimant's activities that  
15 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a  
16 substantial part of the day engaged in pursuits involving the performance of  
17 exertional or non-exertional functions, the ALJ may find these activities  
18 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,  
19 674 F.3d at 1113. "While a claimant need not vegetate in a dark room in order to  
20 be eligible for benefits, the ALJ may discount a claimant's symptom claims when

1 the claimant reports participation in everyday activities indicating capacities that  
2 are transferable to a work setting” or when activities “contradict claims of a totally  
3 debilitating impairment.” *Molina*, 674 F.3d at 1112-13.

4 The ALJ found Plaintiff’s activities demonstrate he can maintain  
5 concentration and pace for at least simple tasks. Tr. 20. The ALJ noted Plaintiff  
6 requested a bus pass so that he could get to his appointments, and that he was able  
7 to perform personal care and hygiene, walk his dog, and do housework. Tr. 19,  
8 387, 410. Plaintiff testified he spends his days playing computer games and the  
9 ALJ noted Plaintiff’s report in 2018 that he played a lot of online games  
10 throughout the day. Tr. 21, 49, 567-68. The ALJ noted Plaintiff’s report in  
11 February 2018 that he was working on creating a YouTube channel with an online  
12 friend, and that this was helping him manage his anxiety and anger symptoms. Tr.  
13 22, 425. In January 2018, he reported he was living with an older couple and  
14 helping around the house with chores and buying groceries. Tr. 412. In March  
15 2018, he reported spending a lot of time with his girlfriend. Tr. 435. In December  
16 2018, he reported he liked to cook and was cooking that night for people he lived  
17 with; he reported hobbies including gaming. Tr. 515. On this record, the ALJ  
18 reasonably concluded that Plaintiff’s activities of daily living were inconsistent  
19 with Plaintiff’s symptom claims, particularly as it related to his ability to  
20 concentrate. This finding is supported by substantial evidence and was a clear and

1 convincing reason to discount Plaintiff's symptom complaints. Plaintiff is not  
2 entitled to remand on these grounds.

### 3 C. Step Five Analysis

4 Plaintiff argues the ALJ erred at step five. ECF No. 20 at 17-20. At step  
5 five of the sequential evaluation analysis, the burden shifts to the Commissioner to  
6 establish that 1) the claimant can perform other work, and 2) such work "exists in  
7 significant numbers in the national economy." 20 C.F.R. §§ 404.1560(c)(2),  
8 416.960(c)(2); *Beltran*, 700 F.3d at 389. In assessing whether there is work  
9 available, the ALJ must rely on complete hypotheticals posed to a vocational  
10 expert. *Nguyen*, 100 F.3d at 1467. The ALJ's hypothetical must be based on  
11 medical assumptions supported by substantial evidence in the record that reflects  
12 all of the claimant's limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir.  
13 2001). The hypothetical should be "accurate, detailed, and supported by the  
14 medical record." *Tackett*, 180 F.3d at 1101.

15 The hypothetical that ultimately serves as the basis for the ALJ's  
16 determination, i.e., the hypothetical that is predicated on the ALJ's final RFC  
17 assessment, must account for all the limitations and restrictions of the claimant.  
18 *Bray*, 554 F.3d at 1228. As discussed above, the ALJ's RFC need only include  
19 those limitations found credible and supported by substantial evidence. *Bayliss*,  
20 427 F.3d at 1217 ("The hypothetical that the ALJ posed to the VE contained all of

1 the limitations that the ALJ found credible and supported by substantial evidence  
2 in the record.”). “If an ALJ’s hypothetical does not reflect all of the claimant’s  
3 limitations, then the expert’s testimony has no evidentiary value to support a  
4 finding that the claimant can perform jobs in the national economy.” *Id.* However,  
5 the ALJ “is free to accept or reject restrictions in a hypothetical question that are  
6 not supported by substantial evidence.” *Greger v. Barnhart*, 464 F.3d 968, 973  
7 (9th Cir. 2006). Therefore, the ALJ is not bound to accept as true the restrictions  
8 presented in a hypothetical question propounded by a claimant’s counsel if they are  
9 not supported by substantial evidence. *Magallanes v. Bowen*, 881 F.2d 747, 756-  
10 57 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771, 773 (9th Cir. 1986). A  
11 claimant fails to establish that a step five determination is flawed by simply  
12 restating an argument that the ALJ improperly discounted certain evidence, when  
13 the record demonstrates the evidence was properly rejected. *Stubbs-Danielson*,  
14 539 F.3d at 1175-76.

15 Plaintiff contends the ALJ erred by failing to provide limitations for all of  
16 Plaintiff’s impairments in the RFC and the hypothetical to the vocational expert.  
17 ECF No. 20 at 17-20. However, Plaintiff’s argument is based entirely on the  
18 assumption that the ALJ erred in his analysis of the medical opinions. As  
19 addressed *supra*, the ALJ properly assessed the medical opinion evidence of Dr.  
20 Genthe, Dr. Metoyer and the state agency psychological consultant, and Plaintiff

1 has waived arguments concerning any other medical opinion evidence.

2 For reasons discussed throughout this decision, the ALJ's consideration of  
3 the medical opinion evidence is legally sufficient and supported by substantial  
4 evidence. The ALJ has the discretion to evaluate and weigh the evidence and the  
5 Plaintiff's alternative interpretation of the evidence does not undermine the ALJ's  
6 analysis. The ALJ did not err in assessing the RFC or finding Plaintiff capable of  
7 performing work existing in the national economy, and the RFC adequately  
8 addresses the medical opinions in this record.

9 Plaintiff is not entitled to remand on these grounds.

### 10 CONCLUSION

11 Having reviewed the record and the ALJ's findings, the Court concludes the  
12 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
13 Accordingly, **IT IS HEREBY ORDERED:**

14 1. The District Court Executive is directed to substitute Kilolo Kijakazi as  
15 Defendant and update the docket sheet.

16 2. Plaintiff's Motion for Summary Judgment, **ECF No. 20**, is **DENIED**.

17 3. Defendant's Motion for Summary Judgment, **ECF No. 21**, is  
18 **GRANTED**.

19 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.  
20

1 The District Court Executive is directed to file this Order, provide copies to  
2 counsel, and **CLOSE THE FILE.**

3 DATED October 8, 2021.

4 *s/Mary K. Dimke*  
5 MARY K. DIMKE  
6 UNITED STATES MAGISTRATE JUDGE  
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